No. 80-396

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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I. THE PUNITIVE AWARD AS A DETERRENT

The respondents suggest in their brief that this Court should ignore both the historic immunity from punitive awards enjoyed by municipalities in the United States as it existed in 1871 and today and the societal consequences of permitting such awards on the rather thin theory that the purposes of Section 1983 will somehow be furthered by abrogating the traditional immunity.

They argue that punishing the generally innocent taxpayer will focus his outrage on city officials to the point where the

"rascals will be turned out" at the next election thus promoting the deterrent purpose of the Act.

But is this so? There are always more eligible voters than taxpayers. And no one who is not a taxpayer feels the deterrence.

Nowhere in their brief do respondents address themselves to the question of guilt—a *sine qua non* to the award of punitive damages.

If the officials have not acted in good faith or maliciously they are liable and, as here, can be made to respond in both compensatory and punitive damages. Is that not a real deterrence? How much more by way of furthering the purpose of the Act is accomplished by punishing the municipal taxpayer.

Does it really make sense to suggest that a municipal officer knowing that he may be individually liable will behave better if he is also made aware that the taxpayers will share his liability? Of course not.

The respondents also suggest at page 16 of their brief "that the effectuation of the underlying goals of section 1983 takes precedence over a mechanical invocation of common law tort rules".

The petitioners do not urge a "mechanical application" of a common law rule but rather the recognition of a traditional immunity "so firmly rooted in the common law and. . . supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980).

If this were not so, it is impossible to rationalize this court's holdings in *Carey* v. *Piphus*, 435 U.S. 247 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Strickland*, 420 U.S. 308 (1975) or *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

Neither does it explain the following language from *Tenney* v. *Brandhove*, 341 U.S. 367 (1951):

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute...were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U.S., at 376."

The respondents repeatedly stress "deterrence" as a "key consideration" of the objectives of Section 1983 (Respondents' Brief p. 19).

That argument ignores completely this Court's undivided opinion in *Carey* v. *Piphus*, (supra) where the Court noted:

> "Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument. Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.
>
> Our legal system's concept of damages reflects this view of legal rights. 'The cardinal principle of damages in

Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty.' 2 F. Harper & F. James, Law of Torts § 25.1. p. 1299 (1956) (emphasis in original). The Court implicitly recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions 'found. . . to have been violative of. . . constitutional rights and to have caused compensable injury. . . .' Wood v. Strickland, 420 U.S., at 319 (emphasis supplied); see Codd v. Velger, 429 U.S. 624, 630-631 (1977) (Brennan, J., dissenting); Adickes v. S. H. Kress & Co., 398 U.S. 144, 232 (1970) (Brennan, J., concurring and dissenting); see also Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388, 397 (1971) (action for damages directly under Fourth Amendment); id., at 408-409 (Harlan, J., concurring in judgment). The lower federal courts appear generally to agree that damages awards under § 1983 should be determined by the compensation principle.

"The members of the Congress that enacted § 1983 did not address directly the question of damages, but the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871. Two other sections of the Civil Rights Act of 1871 appear to incorporate this principle, and no reason suggests itself for reading § 1983 differently. To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. See Imbler v. Pachtman, 424 U.S., at 442 (WHITE, J., Concurring in judgment)."

This is not a voting rights case or a procedural due process case in which compensatory damages are difficult or impossible to prove in the face of a clear wrong. Here the damages were virtually mechanically provable and literally unchallenged.

The respondents were compensated in the *full* amount of their loss by the jury. They recovered punitive damages against the actors.

To the extent that the Act is remedial, a remedy has been supplied.

II. Further Legislative History

The respondents paradoxically enough have faulted petitioners first for referring to the Legislative history of the Civil Rights Act of 1871 at all and secondly for quoting it so sparingly. See Brief for the respondents at page 14. Petitioners herein shall first remedy respondents' second charge, then reply to respondents' first charge.

Representative Blair's argument, notwthstanding respondents' intimations otherwise, was not aimed only at the imposition of liability on municipalities for failure to perform tasks that they were under no legal duty to perform. An examination of the debate surrounding passage of the Sherman Amendment amply illustrates that the possibility of a new and ruinous liability to be imposed upon the municipalities was a critical concern to Congress. Representative Kerr, a vocal opponent to the Civil Rights Act of 1871 in general, and the Sherman Amendment in particular, stated in opposition to that latter amendment,

> "I now come to inquire is it competent for the Congress of the United States to punish municipal organizations of this kind in this way at all, with or without notice? My judgment is that such power nowhere exists; that it cannot be found within the limits of the Constitution; that its exercise cannot be justified by any rational construction

of that instrument. I hold that the Constitutional power of the federal government to punish the citizens of the United States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States, which are a necessary and most essential part of the autonomy of state governments, without which there can logically be no State government. For it must be remembered that if you can impose these penalties at all upon the counties, parishes or cities, and can invade their treasuries or control their ministerial offices to any extent whatever, your power is unlimited, it may go to any extent you please, it may take the entire control of all these officers of the State governments, and thus practically and substantially break down those governments, putting everything and everybody under the sovereign world and pleasure of the Congress of the United States."

42 Congressional Globe 1st Session 788 (1871).

Representative Butler of Massachusetts, in response to Mr. Kerr's arguments, states at page 792:

"The invalidity of the gentleman's argument is that he looks upon this as a punishment for the county. Now, we do not look upon it as a punishment at all. It is a mutual insurance. We are there a community, and if there is any wrong done by our community, or by the inhabitants of our community, we will indemnify the injured party for that wrong, to the value, in our case, of three-fourths of the damages. We will not say to the man who has suffered the loss, 'you shall bear our losses alone;' but we will stand up manfully, put our hands in our pockets and pay our share of the loss, in order to make good his damage; we will bear equally with him the burden and the wrong.

> "The difficulty in the argument—altogether on the other side—has been that this has been treated as if it were a punitive section only. It is not. It is an insurance section. It insures the citizen the protection of the laws; and the considerations as to the want of power to punish or the want of power to interfere with crimes in the States nowhere applies to this section. It is not punitive or penal, but remedial simply. And the question comes up whether the United States, under our Constitution, has the power to give a remedy to the citizen when he is wronged."

In language curiously reminiscent of the Supreme Court of Louisiana's opinion in *McGarry* v. *President and Council of Lafayette*, 12 Rob. 674, 43 Am. Dec. 239 (1846), Representative Poland states in opposition to the Sherman Amendment:

> "Some gentlemen and among them the gentleman from Tennessee (Mr. Maynard), seem to have failed entirely to notice the distinction between these municipal organizations and ordinary business corporations, and to suppose that the national government can deal with one precisely as with the other. A business corporation, as a bank, railroad company, or manufacturing corporation, is in effect nothing but a partnership. It is an association of persons for a business venture or an enterprise. The corporate character given is in effect nothing but a partnership. It is an association of persons for business venture or an enterprise. The corporate character given to it is for mere business convenience, to give it more permanent existence, to prevent dissolutions upon the death of a member, to facilitate the transfer of interest in it, and to enable it to sue without joining all the partners or shareowners as parties, and save it suits from abatement by death or transfer of interest. In fact and substance it is

a mere private partnership, may be taxed and otherwise dealt with by the general government in the same way and to the same extent as a firm. Counties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State and are subject only to such duties and liabilities as State laws impose upon them. In a sense they are corporations, but with only such powers and subject to such burdens as a State may deem advisable.

"The national Government has the fullest power of taxation, either by the imposition of duties on imports or upon the products and business of our own country. It may punish frauds upon its revenue, derived in either form. It may provide for forfeiture of smuggled goods or of illicit distilleries. Indeed, the power of the Government in this respect is hardly a definable extent. But what would be thought of in national law which should impose a penalty upon the town in which a successful smuggler lived, or where an illicit distillery should be run, or give an action against a town for the loss of the Government in duties or taxes, by such operations? But it would be equally in the power of the national Government to do this as to enact this Senate Amendment. I say again, it seems to me that legal gentlemen who support it cannot have given it proper thought." 42 Congressional Globe, 1st Session 794 (1871).

It is clear, beyond any argument, that the imposition of a punitive award upon a municipality was abhorrent to the members of the 42nd Congress.

Since it is the duty of this Court to determine the intent of the Legislators, the legislative history of the Civil Rights Act of 1871 has been and always will be crucial to any conflict arising

regarding the interpretation of 42 U.S.C. Section 1983. The respondents' contention that the legislative history should not be considered is the ultimate folly. In this case, the Legislative intent is clear on the record. More importantly, the bearing rationale which prompted the members of the 42nd Congress to deplore the imposition of punitive liability upon a municipality remain entirely valid today. The passage of time has not muted their arguments. The respondents cannot silence them.

Respectfully submitted,

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